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BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: WC Docket No. 02-214, *Application by Verizon Virginia Inc., Verizon Long Distance Virginia Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization To Provide In-Region, InterLATA Services in Virginia*

Dear Ms. Dortch:

Verizon's October 16 ex parte letter concerning its "no build" policy for provisioning loops to CLECs merely provides further confirmation that this policy constitutes unlawful discrimination under 47 U.S.C. §§ 251(c)(2)(D), (3) and §§ 271(c)(2)(B)(ii), (iv); precludes Verizon's loop rates in Virginia from benchmarking with Verizon's loop rates in New York; and has resulted in non-TELRIC compliant loop rates. These facts require denial of Verizon's 271 application.

Verizon does not and cannot dispute the basic facts. Since May 2001, Verizon has enforced a discriminatory and anticompetitive "no facilities" policy, whereby Verizon refuses to provide unbundled loops when doing so purportedly would require "additional construction."[1] Verizon's assertion that "the activities at issue in fact involve substantial construction" (Verizon Oct. 16 ex parte at 2) is nonresponsive. While *some* of the loops that Verizon refused to provision may genuinely have required additional

[1] *See* AT&T Comments (Aug. 21, 2002) at 13-16; AT&T Reply Comments (Sept. 12, 2002) at 9-13; AT&T ex parte letter (Oct. 7, 2002) at 2-6.

construction, Verizon does not dispute that it invokes its "no facilities" policy when the required work is routine or minor as installing a repeater shelf in the central office, customer location, or remote terminal; providing an apparatus/doubler case; placing fiber or a multiplexer; adjusting the multiplexer to increase its capacity; placing riser cable or a buried drop wire; or placing fiber or copper cable to replace defective copper cable or provide spare capacity.[2] Nor does Verizon dispute that it rejects DS-1 UNE orders from CLECs for "no facilities" even when the only work needed to provide the requested UNE is to open a cable sheath to splice *existing* pairs into an *existing* apparatus case.[3] Nor does Verizon deny that its "no facilities" policy in Virginia results in the rejection of up to 39 percent of CLEC orders for high capacity loops in Virginia—a rejection rate that dwarfs the corresponding rejection rates of other BOCs, which are typically in range of three percent.[4] And Verizon does not deny that its "no build" provisioning policy extends to ordinary voice-grade loops, not just DS3 or DS1-grade loops, and that the policy even encompasses simply splicing together sections of an in-place copper DS-0 cable pair to provision a loop.[5]

A. Verizon's "No Build" Provisioning Policy Discriminates Unlawfully Against CLECs.

Verizon's October 16 ex parte confirms beyond doubt that its provisioning policy constitutes unlawful discrimination against CLECs within the meaning of 47 U.S.C. §§ 251(c)(2)(D), (3) and §§ 271(c)(2)(B)(ii), (iv). Verizon does not deny that it aggressively solicits and fills orders received from its retail end users for the same capacity that Verizon refuses to provision to CLECs as UNEs[6]—at retail charges for "special access" that are approximately *five times* the recurring cost of a DS1 loop plus cross-connect.[7] Verizon concedes that it differentiates UNE orders from retail and access orders. In the words of Verizon's October 16 ex parte, "Verizon will construct network facilities for all customers, including wholesale customers, under the relevant access tariffs."[8] The CLECs' grievance is not that Verizon is discriminating *among* its CLEC purchasers of UNEs, but that it is discriminating—and discriminating unlawfully—*between* those customers and its retail purchasers of access and other retail services.

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[2] *See* AT&T Comments (Aug. 21, 2002) at 13-14; AT&T Reply Comments (Sept. 12, 2002) at 9-10; AT&T ex parte letter (Oct. 7, 2002) at 2-3.

[3] AT&T ex parte letter (Oct. 7, 2002) at 2-3.

[4] *Id*.

[5] *Id*. at 2-3; *id*., Attachments 1 and 2

[6] *Id*. at 3.

[7] *Id*.; AT&T Reply Comments at 10.

[8] Verizon Oct. 16 ex parte at 2.

Verizon main legal defense—that "the Act does not require" an incumbent LEC "to construct network elements . . . for the sole purpose of unbundling those elements for AT&T or other carriers" (Verizon ex parte at 1-2)—evades the issue. The issue here is not whether a policy of not supplying high-capacity loops would violate the Act if applied in an even-handed fashion to both CLEC requests for UNEs and orders from retail customers and access customers for special access—an issue that the Commission need not resolve in this case. The issue is whether it is unlawfully *discriminatory* for Verizon to apply one provisioning policy for retail/access customers and another for CLECs—to "build for the retail side" while refusing to "build" the same capacity, in the same circumstances, when CLECs request it as a UNE.[9]

Verizon's contention that its discrimination is lawful because its loops are not "essential facilities" (Verizon ex parte at 2-5) is equally unfounded. Verizon's loops clearly are essential facilities. Non-ILEC facilities capable of providing special access services have captured only a small share of the market, and provide no competitive relief whatsoever for the vast majority of end users whose facilities are not connected to those competing suppliers. Verizon's claim that "high-capacity loops are available from many alternative suppliers, and the provision of special access service is highly competitive" (Verizon ex parte at 2) has been debunked in the Triennial Review Proceeding, the very docket that Verizon cites. In any event, the Commission has never excluded high capacity loops from the unbundled network elements that Verizon must provision.

The record in that docket demonstrates that the ILECs' "evidence" of significant competitive inroads by CLECs into the market for "high capacity" transport and loops rests on grossly inflated claims of CLEC market shares in special access services (and local high capacity Frame Relay and asynchronous transfer mode ("ATM") services).[10] The ILECs' claim that CLECs have captured as much as 36 percent of the special access market[11] is illustrative. The ILECs' claim was based on a black box methodology that

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[9] The Commission's Pennsylvania 271 decision, cited on page 2 of Verizon's ex parte, is inapposite for the same reason. In that decision, the Commission considered only whether a restrictive loop provisioning policy was permitted by the Commission's rules—not whether it could be applied in a discriminatory fashion or the implications of such a policy for the Commission's rate benchmarking policy and TELRIC cost standards. Pennsylvania 271 Order ¶¶ 91-92.

[10] *See generally* CC Docket No. 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* ("*Triennial Review Proceeding*"), AT&T Reply Comments (July 17, 2002) at 180-87. AT&T hereby incorporates by reference its comments and reply comments in that docket.

[11] Verizon ex parte at 3-4; *accord*, Reply Comments of SBC, CC Docket No. 01-321, at 5, 9 (filed February 12, 2002); Comments of SBC, CC Docket No. 01-321, at 8-9 (filed January 22, 2002); SBC *Ex Parte,* CC Docket No. 96-98, at 2 (filed August 17, 2001); SBC *Ex Parte*, CC Docket No. 96-98, at 3 (filed July 24, 2001); Reply Comments of SBC, Verizon and BellSouth, CC

mixed and matched data sources to achieve a pre-determined result.[12] Recent data from the Commission conclusively refute this estimate as grossly inflated. The Commission's most recent data show that the ILECs' share of the special access services market is *88.5 percent*.[13] And even this figure understates the ILECs' dominance and overstates the true level of facilities-based competition, because it includes CLEC revenues from the resale of incumbent LEC interstate special access services.

Verizon's claim that AT&T has admitted to serving "more than 30 million voice-grade equivalent lines over its network, most of which are high-capacity special access and private lines" (Verizon ex parte at 3) is also beside the point. The "30 million VGEs" do not represent a conversion of voice lines into VGEs. On the contrary, they consist mostly of *additional* services, principally *private line* data services typically offered over OC-3, OC-12, or OC-48 circuits, that provide no competitive alternative whatsoever for the vast majority of end users.[14]

Verizon's characterization of statements by AT&T President David Dorman is equally misleading. The figures offered by Mr. Dorman are for private data lines (OCx) that connect end users to the AT&T network—i.e., *lines that do not connect to the local switched network*. The reality is that, as the Commission's own figures demonstrate,

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Docket 96-98, at 2, 24-5 (filed June 25, 2001); Reply Comments of SBC and Verizon, CC Docket 96-98, at 1, 5, 14-15 (filed April 30, 2001); Comments of SBC and Verizon, CC Docket 96-98, at 5, 16 (filed April 5, 2001); Joint Petition of SBC, Verizon and BellSouth, at 1, 4-6 of Attachment B (filed April 5, 2001); Reply Comments of BellSouth, CC Docket 01-321, at 6 (filed February 12, 2002); Reply Comments of BellSouth, CC Docket 96-98, at 3 (filed April 30, 2001); Comments of BellSouth, CC Docket 96-98, at 2, 8, 11, 21-22, 25 (filed April 5, 2001); Reply Comments of Verizon, CC Docket 01-321, at 5 (filed February 12, 2002); Comments of Verizon, CC Docket 01-321, at 5 (filed January 22, 2002).

[12] *Triennial Review Proceeding*, AT&T Use Restriction Reply Comments at 17-19; Pfau Use Restriction Dec. ¶¶ 5-21.

[13] *See* Industry Analysis Division, FCC, *Telecommunications Industry Revenues 2000*, Tables 5 and 6 (January 2002). These tables show that in 2000, CLECs had $1.416 billion in interstate special access and private line revenues, whereas ILECs had $9.825 billion in interstate special access and private line revenues.

[14] AT&T's 2.7 million business voice lines are included within the total 30 million VGEs, but the statement broke them out for the purpose of accurately distinguishing between AT&T's *local* service lines and its *overall* set of services. This is fully consistent with the data AT&T has provided to the Commission in its Form 477s. Indeed, the ILECs are comparing apples to oranges. The CLEC estimates of voice-grade equivalents, which are cited by the ILECs, are estimates that combine local lines with private line access. The Commission's Form 477 directions specifically instruct carriers to report only local access lines that can connect to the local public switched network.

competing suppliers of special access have captured only 12 percent of the overall market – and that share includes *all* CLEC services, the bulk of which are merely resold ILEC services.

Verizon also contends that no price squeeze exists because "Verizon invariably sells special access to wholesale customers at the same—*or lower*—rates than it sells such services to its own retail customers," a circumstance that precludes any claim that the "costs, revenues and necessary margins . . . doom competitors to failure." Verizon ex parte at 3-5. But it is tautologically obvious that a wholesale competitor *is* doomed to failure if it must pay Verizon a wholesale price that is no lower than what Verizon charges retail customers. Even the most efficient CLEC must incur some retail costs. If there is no margin between the wholesale and retail prices, even a perfectly efficient CLEC cannot recover the revenue needed to cover those wholesale plus retail costs.

Verizon's discounting policies, far from alleviating the price squeeze, simply illustrate Verizon's overwhelming market power. Verizon and other ILECs do not offer discounts to give a break to wholesale competitors like AT&T. To the contrary, the ILECs have used their optional pricing plans ("OPPs") to lock AT&T and others into long term contracts with volume commitments that, as a practical matter, prevent AT&T from relying on substitute sources of special access such as UNEs or other CLECs.[15] Moreover, Verizon is still free to undercut any wholesale volume discount, and engage in a price squeeze, by offering deeper retail discounts through contract tariffs.[16]

B. Verizon's "No Build" Loop Provisioning Policy Precludes The Commission From Finding that Verizon's Loop Rates In Virginia Benchmark With New York.

Wholly apart from its discriminatory nature, Verizon's provisioning policy precludes the Commission from finding that Verizon's loop rates in Virginia satisfy a benchmark comparison with Verizon's New York rates. As previously explained by AT&T, a necessary precondition for a meaningful benchmark comparison is that the services whose rates are compared must cover comparable facilities or services. Verizon's current "no facilities" provisioning policy, however, renders a "loop" in Virginia clearly a less costly and less valuable input than the corresponding "loop" that the Commission and the New York Public Service Commission understood Verizon to be providing during the New York 271 proceeding. In the New York proceeding, the

[15] Likewise, AT&T's supposed concession that "'a majority of the CLECs' large business customer locations' is [sic] 'provided through the use of ILEC special access services'" (Verizon ex parte at 4) undercuts rather than supports Verizon's position. The CLECs' dependence on the services of Verizon merely highlights the absence of a viable facilities-based alternative at most locations.

[16] *Id*. at 20-23.

purchase of a loop by a CLEC was thought to include the implicit right to buy additional loops at the same unit price. Under Verizon's subsequent provisioning policy in Virginia, there is no comparable right.[17]

The option of supplying additional loops on demand has both a cost to Verizon (i.e., the carrying cost of the spare capacity, measured by fill factors, needed to make the availability of additional loops a meaningful one) and a value to CLECs. Hence, a simplistic benchmark comparison of Virginia loop prices with New York loop prices is as nonsensical as the conclusion that a stripped down entry-level automobile is reasonably priced because it offered for sale at the same price as a fully loaded model from the same manufacturer,[18] or the proposition that price of a kilowatt hour of electricity supplied under an interruptible supply contrast is a valid benchmark for the price of the same quantity of electricity supplied under a firm supply contract.

Verizon's assertion that the Commission should ignore this issue "because AT&T did not raise it in the UNE rate proceeding before the Virginia SCC" (Verizon ex parte at 5) is frivolous. The "UNE rate proceeding before the Virginia SCC" occurred in 1997-98. Verizon first disclosed its "no build" provisioning policy in an industry letter on July 24, 2001,[19] and first revealed its true nature and full extent in the ex parte comments filed by Verizon in the current proceeding. The exhaustion of remedies doctrine does not require litigants to have clairvoyance.

Verizon's related suggestion that the Commission should ignore the loop provisioning issue because AT&T raised it "less than one month before the expiration of the statutory 90-day review period" (Verizon ex parte at 5) is also frivolous. Verizon has had notice of the loop provisioning issue for at least six months, since the parties litigated it in the "consultative" proceeding before a hearing examiner of the Virginia SCC. The report of the hearing examiner designated by the Virginia SCC to take evidence in the abortive 271 proceeding before that agency makes clear that Verizon was fully on notice of the issue:

> However, Verizon Virginia's 'no facilities' policy should be revised to require rearrangement and connection of existing facilities for all CLEC UNE Loop orders. *Furthermore, the FCC should analyze and adjust its TELRIC pricing model to be consistent with the 'no build' policy*.

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[17] AT&T ex parte (Oct. 7, 2002) at 3-4.

[18] *Id*.

[19] *See* http://128.11.40.241/east/wholesale/resources/clec_01/07_24.htm.

See Skirpan Report at 117 (emphasis added); *see generally id*. at 114-18 (noting existence of record on issue). AT&T has also raised the issue repeatedly in the present proceeding, beginning with its *initial* comments filed on August 21, 2002.[20] Finally, there is something ironic about Verizon even raising a timing objection. A company that has made an art form of flouting the Commission's complete-when-filed rule by repeatedly filing rate reductions near the end of the 90-day statutory period has no business lecturing other parties about the difficulty of considering belated claims.

The real "difficulty" with AT&T's argument is that Verizon has no answer to it. Verizon's recital of boilerplate precedent for the proposition that benchmarking is appropriate as a general rule (Verizon ex parte at 5-6) simply begs the question: is benchmarking appropriate when the services being benchmarked are very different in quality and kind? To state the question is to answer it. A loop that is accompanied by an implicit option to buy additional loops on the same terms and conditions is both more valuable—and more costly to provide—than a loop unaccompanied by any such implicit option.

Verizon's rejoinder that "at no point in time has Verizon's facilities policy in New York been different from its policy in Virginia" (Verizon ex parte at 6) evades the issue. It is entirely possible, as Verizon asserts, that its change in provisioning policy has occurred simultaneously throughout the region. The relevant fact, however, is that when the New York PSC set Verizon's loop rates in New York, and the FCC uphold those rates as TELRIC-compliant in the New York 271 case, there was nothing in the record to indicate that Verizon had adopted a newly restrictive provisioning policy. The two tribunals certainly made no such findings.[21] Whether Verizon's loop provisioning policies in New York and Virginia changed in tandem, the loop provisioning policies now enforced by Verizon in Virginia are clearly at odds with the loop provisioning policies that the Commission and the SCC believed to apply in New York when the New York cases were decided. Hence Verizon's rates in New York were set and upheld on assumptions that can no longer apply to Verizon loops in Virginia.[22]

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[20] *See* AT&T Comments (Aug. 21, 2002) at 13-16; AT&T Reply Comments (Sept. 12, 2002) at 9-13; AT&T ex parte letter (Oct. 7, 2002) at 2-6.

[21] *See* New York 271 decision at ¶ 289 (finding no evidence to support claim that Verizon was "unable to provision high quality loops such as DS1s in a timely manner"); *id*. ¶ 280 ("Bell Atlantic presented sufficient evidence to demonstrate that it provisions loops in the quantities that competitors reasonably demand, at an acceptable level of quality, and within a reasonable timeframe"). There is nothing in the subsequent Phase II UNE decisions of the New York PSC and its hearing examiner to suggest that the current New York rates reflect any changed understanding of Verizon's loop provisioning policies.

[22] Verizon's claim that "in neither state does the UNE rate for one loop entitle a CLEC to one or more additional loops at no additional cost, as AT&T appears to suggest is the case in New York"

C. Verizon's "No Build" Loop Provisioning Policy Precludes The Commission From Finding that Verizon's Loop Rates In Virginia Are TELRIC Compliant.

Verizon's loop provisioning policy also precludes the Commission from finding that Verizon's loop rates in Virginia comply with TELRIC. Verizon's October 16 ex parte does not come close to bridging the hopeless contradiction between the cost assumption underlying Verizon's current UNE prices[23] with Verizon's current provisioning policy.[24] Verizon's litigation posture is schizophrenic: it charges CLECs for the costs of using a network with a "Build" policy, while invoking Verizon's "No Build" policy to deny them the use of the unused capacity for which they continue to pay.

The cost of the currently unused loops that CLECs supposedly pay for—but which Verizon refuses to provision on request—is large. The fill factors within Verizon's cost studies provide for substantial amount of spare capacity to account for future increased demand, customer churn, administrative spare requirements and defective pairs.[25] In light of Verizon's no-build policy, CLECs are not responsible for the cost of carrying most of this spare capacity. Charging CLECs for this spare capacity is a basic TELRIC violation, for one of the fundamental elements of TELRIC is the causation requirement: purchasers of UNEs are responsible only for the forward-looking costs that they cause the ILEC to incur.[26]

Verizon does not dispute that its no-build policy is flatly inconsistent with the assumptions underlying the annual cost factors in its own cost studies. As explained by AT&T, the Verizon cost studies from which the current UNE loop rates are derived used the CAPCOST Plus model to develop annual cost factors ("ACF") to convert forward-looking investments to recurring annual charges. The CAPCOST Plus model, based on a series of study inputs, computes annual factors for return of investment (depreciation),

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(Verizon ex parte at 6) misstates AT&T's position. AT&T does not contend that additional loops in New York were or are free, but only that a CLEC was believed to have a reasonable expectation of having Verizon honor requests for the provisioning of additional loops on the same terms and conditions (including unit price).

[23] I.e., that the TELRIC cost of the loop properly includes the cost of a large amount of spare capacity that Verizon must hold in reserve to be able to provision additional loops in the future upon request.

[24] I.e., that Verizon's loop provisioning is far less reliable, and the inventory of spare loops held in reserve for future provisioning requests so limited that as many as 39 percent of CLEC requests for loops are denied.

[25] AT&T ex parte (Oct. 7, 2002) at 5.

[26] *Id*. at 5.

return on investment, income taxes, direct operating expenses, support expenses, property taxes and other expenses. For the calculation of return of investment, return on investment and income taxes, the CAPCOST Plus model—based on the Virginia State Corporation Commission's ("SCC") Final Order—was run for five separate vintages. Each vintage, in the CAPCOST Plus parlance, represents a study year. In specifying five vintages, the SCC instructed Verizon (then Bell Atlantic) to run the CAPCOST Plus model for five years. For each vintage, the CAPCOST Plus model provides for incremental investment to serve the increase in demand input to the model for that year. Over five vintages, Verizon's cost study provides for a substantial additional increment of forward-looking investment to accommodate anticipated increased demand after the first year.[27] Under Verizon's no-build policy, this additional investment would have to be removed from the cost study to make the cost study assumptions consistent with the policy.

Verizon asserts that CLECs have no grievance about this change of assumptions because Verizon does not charge CLECs for additional loops that Verizon cannot provision. Verizon misses the point: the cost of sufficient spare capacity to supply additional loops on request in the future is included in prices that CLECs pay for the loops that they *currently* buy from Verizon. As Verizon argued (successfully) to the Virginia SCC during the 1997-98 UNE rate case, "the cost of unused but available capacity or 'inventory' is—just like the cost of the used capacity—a *current economic cost* to BA-VA."[28]

Verizon also suggests that CLECs still benefit from the same amount of spare capacity implied by the fill factors underlying Verizon's current loop rates, albeit not necessarily at the locations where AT&T and other CLECs happen to order lines (Verizon ex parte at 7-8). Verizon engages in large-scale revisionism. The hit-or-miss availability of spare loops that Verizon now offers is a far cry from the large amounts of spare capacity, and the resulting near certainty of loop provisioning, on which Verizon's loop cost studies and rates were based.

In both the first generation (1997-98) UNE case before the SCC, and the second-generation case now pending before this Commission, Verizon argued consistently (and, in the former case, successfully) in favor of fill factors that charge CLECs with the costs of carrying large inventories of additional loops held in reserve in anticipation of future provisioning requests by CLECs and retail customers. Verizon's post-trial briefs in the 1997-98 UNE case before the Virginia SCC state the matter clearly:

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[27] AT&T ex parte (Oct. 7, 2002) at 4-5.

[28] Virginia SCC Case No, PUC970005, *Ex Parte to Determine Prices Bell Atlantic—Virginia, Inc. is Authorized to Charge Competitive Local Exchange Carriers in Accordance with the Telecommunications Act of 1996 and Applicable State Law*, Brief of Bell Atlantic-Virginia, Inc. (Sept. 7, 1997) at 105-06 (emphasis added).

> BA-VA's cost study uses fill factor inputs which are based on BA-VA's actual experience in providing quality service in Virginia. *BA-VA expects that similar levels of inventory will be required in the forward-looking network.*[29]

By contrast, "managing and operating BA-VA's network at the higher utilization rates proposed by the CLECs and Staff would leave BA-VA with an unacceptably high margin of inventory, which would in turn cause a *greater number of held service orders*—slowing repair and service restoration time, and *increasing service provisioning intervals.*."[30]

Verizon's post-trial briefs in the UNE rate arbitration now pending before this Commission are in the same vein. There, for example, Verizon offers the following argument for adopting much lower fill factors for loop investment than proposed by AT&T:

> New capacity must be built in anticipation of demand and without any certainty about what level of demand will materialize. *Verizon VA is required to have facilities available in advance of the specific need in order to meet its legal obligations to provide service to customers upon demand*. . . . Installing capacity in advance also reduces construction costs by permitting network growth in efficient capacity increments and at efficient time intervals.[31]

"The network must be designed to accommodate . . . growth and demand peaks [that] can be unpredictable," Verizon added, even though such a loop provisioning policy inevitably "will leave some lines idle."[32] "Verizon VA has developed its [loop fill] factors" to reflect the operating practices of its outside plant engineers, who "have sought to design and seek to operate the network in an efficient and productive fashion that permits

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[29] Virginia SCC Case No, PUC970005, *supra*, Brief of Bell Atlantic-Virginia, Inc. (Sept. 7, 1997) at 106 (emphasis added).

[30] *Id*. at 107 (emphasis added).

[31] CC Docket Nos. 00-218 & 00-251, *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the CC Docket No. 00-218 Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Verizon initial post-trial brief on cost issues (Jan. 12, 2001) at 104 n. 107 (emphasis added; record citations omitted).

[32] *Id*. at 105.

Verizon VA *to meet service requests in a timely fashion* and avoid unnecessary costs."[33] The "primary factor in distribution utilization is . . . the need to *accommodate subscribers' needs for multiple lines in a timely manner*."[34]

In contrast, Verizon argues in the pending arbitration, the higher fill factors (i.e., lower levels of spare capacity) advocated by AT&T and WorldCom imply "such a tightly designed new network" that it "could be defunct in a day, because past demand is a poor predictor of tomorrow's need at specific customer locations."[35] If "the Commission were to adopt higher utilization rates, the only way that Verizon VA could achieve those rates would be to abandon its engineering practices—which ultimately would cause service quality and *timeliness to degrade*. . ."[36]

As previously noted by AT&T, Verizon's current loop provisioning policy is also at odds with another aspect of the annual cost factors in Verizon cost study: those ACF's explicitly provide for maintenance and rearrangement dollars (M-dollars). M-dollars—the costs of rearrangements and changes—typically include telephone plant operating expenses which are not repair expenses and include the physical movement of telephone plant or the rearrangement or re-configuration of telephone plant. Inclusion of expenditures for any rearrangement of outside plant is inconsistent with Verizon's no-build policy, and any such costs should be removed from the study.[37]

Verizon asserts that all but a "small percentage" of these activities would be accounted for as capital costs rather than expenses (Verizon ex parte at 8-9). Verizon provides no support for this assertion, however; in any event, a cost overrecovery will occur if *any* of the costs are expensed. Likewise, it is irrelevant that the "SCC did not simply accept Verizon's proposed costs, but instead reduced them substantially" (*id.* at 9). The adjustments to which Verizon alludes involved *other* cost-inflating assumptions proposed by Verizon, and had nothing to do with the issue presented here.[38]

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[33] *Id.*, Verizon Recurring Cost Panel Surrebuttal Testimony (Jan. 9, 2001) at 115 (emphasis added).

[34] *Id*., Verizon initial post-trial brief on cost issues (Jan. 12, 2001) at 110 (emphasis added).

[35] *Id*. at 112.

[36] *Id*., Verizon reply brief on cost issues (Jan. 31, 2001) at 81.

[37] *Id*. at 5-6.

[38] A fact that is hardly surprising. As Verizon went out of its way to emphasize four pages earlier in its ex parte, AT&T did not raise the loop provisioning issue in the 1997-98 case. *See* Verizon ex parte at 5.

D. The Implications Of Verizon's "No Build" Provisioning Policy Must Be Considered In This Proceeding.

In its recent New Hampshire/Delaware 271 decision, the Commission stated that, "because of the lack of sufficient evidence in the record," it would defer the issue to a subsequent enforcement proceeding or the Triennial Review Proceeding.[39] The Commission also noted the "limited information available to the Commission" at the time of the *Pennsylvania Order*.[40] AT&T respectfully submits that this case, with a far more detailed record on the issue, distinguishes this case from the prior 271 proceedings involving Pennsylvania, New Jersey, and New Hampshire/Delaware. The present record (including the submissions cited on pp. 114-18 of the Skirpan report, and the additional submissions by Cavalier and Allegiance in this proceeding) contains voluminous additional information on this issue.

The competitive checklist of Section 271 does not allow the Commission to approve an ILEC's application without finding that the ILEC's UNE prices are (1) just and reasonable, and (2) not unreasonably discriminatory. 47 U.S.C. §§ 271(c)(2)(B)(i), (ii). Accordingly, granting Verizon's 271 application, while relegating the merits of the issues raised by Verizon's new loop provisioning policy to some future proceeding, would be precisely the same action that the Court of Appeals held to be an unlawful "administrative law shell game" in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992). To paraphrase the court's reasoning, "AT&T's complaint asserts that [Verizon] is acting illegally *under present law*, that [Verizon] has violated the law in the past, and that AT&T is and has been injured by [Verizon's] behavior . . . When presented with AT&T's complaint, the Commission had an obligation to answer the questions it raised and to decide whether [Verizon] had violated the statute." *Id*. at 732. The Commission "has an obligation to decide" this case "under the law currently applicable." *Id*.

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[39] New Hampshire/Delaware 271 Order ¶ 114 n. 392.

[40] New Hampshire/Delaware 271 Order ¶ 114; *see also* New Jersey 271 Order ¶ 151 (cross referencing the Pennsylvania 271 order at ¶ 92).

The Commission thus has two choices: either resolve the issues in this proceeding or (if the Commission finds it necessary to defer them to an industrywide proceeding) deny Verizon's 271 application with instructions to refile it after the Commission has resolved some or all of the issues in the latter proceeding.

Very truly yours,

David M. Levy

An Attorney for AT&T Corp.